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IN THE

Supreme Court of the United States

October Term, 1949.

No. 124

ALLEN SMILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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No.....

ALLEN SMILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Allen Smiley, the above named petitioner, prays that a Writ of Certiorari be issued by this Court to review a judgment of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of conviction of the United States District Court for the Southern District of California, Central Division, on Count Three of the Indictment (the convictions on the other counts being reversed), and in this behalf the petitioner respectfully shows:

Opinion of the Court.

The opinion of the United States Court of Appeals was rendered on April 13, 1950 [R. 294], and a petition for rehearing was denied May 11, 1950 [R. 297]. The opinion of the Court of Appeals appears in the record at pages 288 to 295, and has not yet been reported.

Summary Statement of Matters Involved.

1. The United States Court of Appeals affirmed the conviction and sentence of petitioner on one count (Count Three) of one of two indictments charging a violation of subparagraph (18) of Section 746(a), Title 8, United States Code. [R. 3, 38.]

2. The sentence affirmed was as follows:

One year imprisonment and $1,000.00 fine. [R. 38.]

3. The Indictment charged:

> "On or about May 25, 1944, in the County of Los Angeles . . . defendant . . . Allen Smiley, did knowingly, willfully, falsely and fraudulently represent to J. E. Siu, a deputy sheriff of the County of Los Angeles, State of California, said J. E. Siu being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States." [R. 3.]

4. The evidence as to this count is so brief that a complete statement of it constitutes a summary:

(a) Deputy Sheriff Siu, to whom it is alleged petitioner made the false statement of citizenship, testified that pe-

titioner was arrested on suspicion of bookmaking and later released [R. 80, 88]; and on the occasion of the arrest of petitioner he, together with a half-dozen other officers, took the petitioner to an office other than the County Jail and there subjected petitioner to lengthy interrogation before removal to the County Jail for booking [R. 85, 86, 87]; that he made out an arrest slip [Exhibit 4] from information given him by the petitioner, and that it contains the date of arrest, color of subject's hair and eyes, age, years lived in County, State and United States [R. 81-82]; that the arrest slip [Exhibit 4] goes to the booking office [R. 82] and that the information contained on the top part of Exhibit 5 is obtained from the arrest slip, Exhibit 4; that he had no conversation with petitioner concerning citizenship [R. 85, 82]; **Siu, to whom it is alleged the representation of citizenship was made, testified that none was made to him**; and Exhibit 4 contains no reference to citizenship.

(b) Deputy Sheriff Hopkins testified that he asked petitioner the questions contained on Exhibit 5 at the time of the booking of the petitioner at the County Jail and that the exhibit contains the information received from petitioner [R. 122]. That he first filled out the upper part of Exhibit 5 above the signature of Mr. Siu, and that then Mr. Siu went away [R. 121-122]; thereafter he filled out the remainder of Exhibit 5. This latter portion of Exhibit 5 contains the question: "United States citizen?" and the answer "Yes." [R. 123.] The information contained in Exhibit 5 was received from the petitioner in answers to questions put to him at that time. [R. 122.]

(c) The purpose of the sheriff's office in taking the arrest slip information [Exhibit 4] was "for a matter of record, identification." [R. 81-82.] "That they make out the slip [Exhibit 4] for identification and the charge that they are booked on." [R. 89.] That Exhibit 5 was a form formulated by the sheriff which they were told to use in booking persons and was a customary procedure. [R. 133-135.] That Exhibit 5 is the booking slip of the Los Angeles County Jail kept in the ordinary course of business in the sheriff's office. [R. 93.] This is all of the evidence on the subject of use and purpose of Exhibit 4 and Exhibit 5.

The foregoing is all of the evidence on the count in question.

Although the trial court refused to permit in the instance of the Sheriff's witnesses to develop what, if any, compulsory measures are used if the arrestee refused to answer questions contained on Exhibits 4 and 5 [R. 89], the record, nevertheless, discloses that compulsion and duress are the ordinary police practices to obtain answers to these questions, *i.e.,* if an arrestee declines to answer, he is booked as a John Doe and incarcerated in a cell until he does answer the questions. [R. 108, 109, 110.]

5. Our specification of error that the evidence was insufficient to establish the offense charged [R. 44, 162, 204] raises the question that proof of false representation of citizenship to a person other than the one named in the indictment as the one to whom it was made amounts to a

complete failure of proof and deprives petitioner of due process because he stands convicted of a charge not made. Also our specification of error IX [R. 45] raises the question of the Court's jurisdiction to impose judgment and points up the proposition of Petitioner's rights under article V of the amendments to the Constitution.

6. The United States Court of Appeals states the matter involved to be:

> "The problem thus posed is: does this answer constitute a representation falsely and fraudulently made to a person having good reason to inquire into the nationality status of appellant? The allegations of the Indictment and the provisions of Section 746(a) require such a degree of proof to sustain the conviction."

The United States Court of Appeals in answering the question in the affirmative reached the conclusions: that "the answer was more than a mere untruth." That "arrestees giving false answers to questions asked . . . do so with a fraudulent purpose of concealing from the peace officers as much as possible about themselves on the theory that the less known about them the greater chance they will have to escape detection in the event of future law violations;" that "it was made with intent to deceive . . . as to a material matter;" that "where some right to inquire exists or the person inquiring has good and sufficient reason for learning the citizenship of the person asked, it is sufficient, and that the inquiring officer in this case was a person with a right to inquire and a sufficient reason for so doing."

Basis of Court's Jurisdiction.

By certiorari the Supreme Court may require any cause in the United States Court of Appeals to be certified to it for determination.

Section 204(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 347, provides that "in any case . . . in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court . . . upon the petition of any party thereto . . . to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted . . . appeal."

Under this statute extensive power is conferred on the Supreme Court. *Gay v. Ruff,* 292 U. S. 25. The purpose of this grant of power was to secure uniformity of decision and to bring up cases of importance which it is in public interest to have decided by the court of last resort. 36 Corpus Juris Secundum, Sec. 204, p. 108; *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202; *Magnum Import Co. v. Coty,* 262 U. S. 159; *Thiel v. Southern Pac. Co.,* 328 U. S. 217.

Under Supreme Court Rules, rule 38(5), 28 U. S. C. A. following Sec. 354, a writ of certiorari may be granted where a United States Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; *Griffin v. McCoach,* 313 U. S. 498; *Bingham's Trust v. C. I. R.,* 325 U. S. 365; *Halvering v. Price,* 309 U. S. 409; *Ticonic Nat. Bank v. Sprague,* 303 U. S. 406; *In re 620 Church Street Bldg.*

Corp., 299 U. S. 24; *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U. S. 237; or has decided an important question of federal law which has not been, but should be settled by the Supreme Court. *Postal S. S. Corporation v. The El Iselo*, 308 U. S. 378; *Carpenter v. Winn*, 221 U. S. 533; *Public Service Commission of Missouri v. Brashear Freight Lines*, 312 U. S. 621; or has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court. *Galloway v. United States*, 319 U. S. 372; *Department of Treasury of State of Indiana v. Ingram-Richardson Mfg. Co. of Indiana*, 313 U. S. 252; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U. S. 464; *United States v. Rizzo*, 297 U. S. 530; *S. Trille v. Scofield*, 308 U. S. 415.

Questions Presented.

Was the defendant under the state of the evidence which showed the representation of citizenship to have been made to a person other than as charged in the indictment accorded due process? Did the trial court have jurisdiction to impose judgment and sentence the petitioner.

Must the answer to an inquiry of citizenship be made to one having a legal right to ask in furtherance of official authority, either public or private, under circumstances which impose a duty on the individual questioned to answer?

Does a mere untruth as to citizenship which does not involve deception as to a material matter violate the statute?

Does a person not required in law to answer the interrogator, be he a public or private official, violate the stat-

ute if his false answer does not amount to a deception affecting the end results?

What is meant by "right to inquire concerning citizenship?"

What is meant by "a good and sufficient reason for learning citizenship?"

Must not the person inquiring concerning the nationality status of defendant be engaged "in an inquiry concerning a matter which made nationality status of the defendant relevant and material to the matter under consideration?"

Does not the allegation in the indictment that the person to whom the false representation of citizenship was made "had a good reason to inquire into the nationality status of the defendant," mean more than any reason or which might be deemed by such person inquiring to be a good reason? Does it not mean, as applied to this case, that the public officer inquiring had to have a right in law in furtherance of his official authority and duty to ascertain defendant's nationality status?

Was citizenship material to identity?

Is a Sheriff such a person who has a legal right as distinguished from a lawful right to ascertain nationality status pursuant to a system of his own in booking arrestees where the limited purpose of booking arrestees is to show the identity of the arrestee and the charge against him?

What is meant by a person having "a good reason to inquire" into the nationality status of appellant?

Is "good reason to inquire" synonymous with a legal right to a truthful answer because of the effect it will have upon the end result?

Reasons for Granting Writ of Certiorari.

The application of the due process rule in the circumstances of proof in a substantive charge that the act was committed against a person other than named in the indictment should be decided by this Honorable Court as well as whether the trial court had jurisdiction to impose judgment and sentence.

The United States Court of Appeals has decided important questions of Federal law, which have not been, but should be settled by this Honorable Court.

The decision of the United States Court of Appeals sought to be reviewed directly conflicts upon a number of questions of Federal law with the decisions of other Courts of Appeal upon the same questions and with itself.

Difference of view among the various United States Courts of Appeal in the construction and application of Federal statutes require the interposition by this Honorable Court by certiorari under the direct conflict rule.

The United States Court of Appeal has decided a question relating to the application of a statute of the United States, which has not been, but should be settled by this Court.

The United States Court of Appeals has decided a question of substance relating to the construction of a statute of the United States, which has not been, but should be settled by this Court.

The Petitioner respectfully represents that accompanying this Petition, and as an exhibit thereto, is a certified

copy of the transcript of the entire record in the case, including the proceedings in the United States Court of Appeals for the Ninth Circuit.

Wherefore, it is respectfully submitted that this Petition should be granted.

OTTO CHRISTENSEN,
Attorney for Petitioner.

JERRY GEISLER,
ROBERT NEEB,
Of Counsel.

Certification.

State of California, County of Los Angeles—ss.

Otto Christensen, being duly sworn deposes and says: that he is counsel for Petitioner in the above and foregoing entitled action; that he prepared the within Petition and that the allegations therein are true as he verily believes, and that the same is not interposed for delay.

OTTO CHRISTENSEN,

Subscribed and sworn to before me this 7th day of June, 1950.

MARGUERITE F. CRIPPS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Jan. 3, 1952.

BRIEF IN SUPPORT OF PETITION.

The Indictment charges a violation of Subparagraph 18 of Section 746(a), Title 8, U. S. C. A., which reads as follows:

> "Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without otherwise being a citizen of the United States."

I.

Opinion of the Court.

The Opinion of the United States Court of Appeals appears in the record at pages 288 to 295, and has not yet been reported. We append a copy of the Opinion as our Appendix II.

II.

Jurisdiction.

The Judgment to be reviewed was entered on April 13, 1950. A petition for rehearing, which was duly filed, was denied by the Court on May 11, 1950. [R. 294, 297.] Your Honors have jurisdiction by virtue of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, U. S. C. A., Section 347, as supplemented by the rules of this Court.

III.

Specification of Errors.

The Court of Appeals erred in not holding that the original judgment was improper for failure to accord the petitioner due process.

The Court of Appeals erred in not holding that Petitioner's rights under article V of the amendments to the Constitution had been violated.

The Court of Appeals erred in not reversing the judgment of the trial court.

The Court of Appeals erred in holding that a deputy sheriff was a person having a "right to inquire and sufficient reason for so doing" into the nationality status of an arrestee in connection with booking him on a charge of suspicion of bookmaking.

The Court of Appeals erred in holding that there was deception as to a material matter.

The Court of Appeals erred in not holding that untruthful statements as to nationality status, made in answer to an inquiry by a deputy sheriff who did not have a legal right to ask in furtherance of official authority and duty authorized by law is not a violation of the statute.

The Court of Appeals erred in not holding that the nationality status of the defendant was not material and relevant to the matter under consideration.

IV.
ARGUMENT.

I.

There Was a Denial of Due Process as Well as a Denial of Petitioner's Rights Under Article V of the Amendments to the Constitution.

We again point out that the *inquiring officer* in this case was the officer who made out Exhibit 5 and not the officer who made out Exhibit 4; and that it is the latter one to whom he is charged with making the false representation of citizenship.

Thus we have the precise case of one being convicted on a charge not made.

This Court said in reversing *Thornhill v. State of Alabama,* 310 U. S. 87, 96, 84 L. Ed. 1093, 1099:

> "Conviction upon a charge not made would be a sheer denial of due process."

To the same effect, *De Jonge v. Oregon,* 299 U. S. 353, 362, 81 L. Ed. 278, 282, 57 S. Ct. 255; *Stromberg v. California,* 283 U. S. 359, 367, 368, 75 L. Ed. 1117, 1122, 1123, 51 S. Ct. 532.

In *Mahler v. Eby,* 264 U. S. 32, 44, 68 L. Ed. 549, 556, the immigration authorities used a form of warrant applicable to a different class of aliens than the one before them. A proper warrant was jurisdictional, so it was held that evidence heard at the hearing could not supply the defect.

Plain error will be noticed and acted upon, even where the point has not been assigned as error on appeal to the Circuit Court. *Silbach v. Wilson & Co.,* 312 U. S. 1, 16; ***Mahler v. Eby, supra.***

In *Edgerton et al. v. U. S.*, 143 F. 2d 697 (C. C. A. 9), it was held that an instruction striking from indictment reference to type of security on which money was loaned was error as changing character of representation as alleged, and amending indictment so as to result in trial of defendants on a charge different from that found by grand jury and was violative of the Fifth Amendment to the Constitution.

Conviction on charge other than as made by grand jury presentment is jurisdictional and therefore void. *Ex parte Bain*, 121 U. S. 1, 13, 7 S. Ct. 781, 30 L. Ed. 849.

Even deportation can only be made for cause charged and stated. *Throumoulopolou v. U. S.*, 3 F. 2d 803 (C. C. A. 1); *Ex parte T. Nayata*, 11 F. 2d 178; *Mahler v. Eby, supra.*

II.

The Decision of the Court of Appeals Is in Direct Conflict With the Decisions of Other Courts of Appeal Upon the Same Questions; Also, the Court of Appeals Has Decided Questions of Substance Relating to the Construction of a Statute of the United States, Which Has Not Been, but Should Be Settled by This Court.

The Court of Appeals posed the basic question to be answered:

> "Does this answer constitute a representation *falsely* and *fraudulently* made to a person having *good reason to inquire* into the nationality status of the appellant? The allegations of the Indictment and the provisions of Subd. 4, par. (18) of Section 746(a) require such a degree of proof to sustain the conviction." (Emphasis added.) [R. 291.]

The Court of Appeals in reaching the conclusion that the Petitioner's answer to Deputy Sheriff Hopkins in connection with an arrest "on suspicion of bookmaking" that he was a citizen, was made falsely and fraudulently to a person having good reason to inquire into Petitioner's nationality status departs from the holdings of all the other cases arising under this statute.

The cases of the Ninth Circuit, as well as of the other Circuits, involved the established elements of the right legally to inquire as to citizenship, materiality as to subject matter, deception as to material subject matter, and the perpetration of fraud, *i. e.*, application for liquor licenses, registration to vote, supporting testimony of good character in aid of admission of an alien as an employee, registration under the draft law, application for employment, etc. In each of these cases there was affirmative action upon the part of the defendant to gain for himself something which he otherwise would not have if his alienage was truthfully disclosed. In each case, the net result would, or could have been different, depending upon whether the individual was an alien or a citizen. In each case, there was direct fraud, not remote speculative possibility of future gain. In each case there was present the co-existing legal right to inquire and legal obligation to answer truthfully.

In the case of *United States v. Achtner* (C. C. A. 2d), 144 F. 2d 49, 52, the court said:

> "Defendant had for a long time been in the employ of the Ebasco Services, Inc., a private corporation, and * * * in answer to a questionnaire of the corporation he stated that he was a citizen of the

> U. S. It would appear that this was a legitimate inquiry on the part of an employer at the time of the deepening national crisis * * *" (p. 52).

The court further said that,

> "the representation of citizenship must still be made to a person having some right to inquire or adequate reason to ascertain a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken * * * to stop the prying of some busy body, and the use of the words 'knowingly' and 'falsely' implies otherwise. Thus it is said that the word 'falsely,' particularly in criminal statute suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' (cases cited) or 'with intent to defraud' * * *."

A "legitimate inquiry" as used by the appellate court above, implies materiality to the transaction at hand, namely, the employment or continued employment of Achtner would or could be affected by his nationality status. Obviously the Company had a right to initiate its own security policies and exclude aliens as employees; the Company here obviously had the right to inquire as well as an adequate reason for ascertaining the defendant's citizenship since it was related to their employment practices. The result — employment — depended upon citizenship. In the instant case, arrest or detention did not depend upon citizenship; neither did identity. Further, the circumstances of the *Achtner* case showed the false claim of citizenship was more than a mere untruth because it could or would affect employment and therefore satisfied the essential element of the charge that it was made "with intent to defraud."

In the case of *U. S. v. Tenderic* (C. C. A. 7), 152 F. 2d 3, 5, the defendant was charged with falsely representing himself to be a citizen to the Bendix Corporation and its officials; the evidence established that he did so both orally and in employment applications, and also that "it was the policy of the Bendix not to employ aliens." The sufficiency of the evidence was challenged, and the Court of Appeals in referring to *U. S. v. Achtner, supra,* said:

> " 'under this statute no limitation was placed upon the circumstances under which and the persons to whom the false representation was made, as long as it was for a fraudulent purpose.' We approve the conclusion and reasoning of the case."

The present case was before Circuit Judges Denman, Stephens and Orr (opinion by Orr). The same Circuit in the case of *U. S. v. DePratu*, 171 F. 2d 75, 76 (before Healey and Bone, Circuit Judges, and Bowen, District Judge), in a case involving the violation of the statute in question, was concerned with the following situation:

Each of the counts 1 and 2 of that indictment charged the defendant on a stated date made a false statement of citizenship in an application for a retail liquor license filed with the Montana Liquor Control Board by answering "Yes" to the question "Are you a citizen of the U. S.?", and in the 3rd count, that he made a false statement of citizenship before a board of special inquiry of the Immigration and Naturalization Service of the United States, when, as a witness, he testified that he acquired U. S. citizenship through his father's naturalization.

The evidence established as to the first two counts, that he filed applications for a liquor license with the State

Control Board having jurisdiction over the issuance of such licenses claiming therein that he was a citizen of the United States, and at the time of filing no one but a citizen was eligible for such a liquor license; and the supporting evidence as to the third count disclosed that the false claim of citizenship was made while he was testifying before the Immigration and Naturalization Service in aid of another alien's application for admission to this country to become an employee in defendant's business.

Of the appellant's contention that the proof did not "sufficiently show that his claims of U. S. Citizenship were material to the transactions at hand," the Court said:

> "In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority * * * Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made * * * to 'stop the prying of some busy body.'"

In the *Achtner, Tenderic* and *DePratu* cases, *supra,* citizenship was pertinent and material to the subject matter and transactions at hand. In the *Achtner* and *Tenderic* cases, the companies had a legal right to establish their respective security policies and to exclude aliens as employees; it follows, therefore, that they had the legal right to inquire, as well as an adequate reason for ascertaining citizenship, since it related to their rightful employment practices. Employment depended upon nationality status. In the *DePratu* case, *supra,* the law gave the authority and imposed the affirmative duty upon the officers inquiring to ascertain citizenship status; the law made citizenship a condition precedent to favorable action in each of the instances involved.

In *U. S. v. Frederick,* 146 F. 2d 488 (C. C. A.), the appellant, a German citizen, was convicted of falsely representing himself to be a citizen of the United States in applying for a poll tax receipt and in applying for a ballot to vote.

In *U. S. v. Prevost,* 149 F. 2d 747 (C. C. A.), the appellant was convicted for falsely representing himself to be a citizen of the United States in a selective service questionnaire and in an application for employment.

In all of the reported cases, citizenship was material to the transaction and subject matter under consideration because the end result would or could have been different, depending upon whether the individual was alien or citizen.

In the present case, the Sheriff's system was his own; the defendant was not a party to it nor under any requirement to answer. As far as the petitioner was concerned it was purely a unilateral matter. The question involved here could be enlarged to any series of questions for information that might strike the Sheriff's fancy. There is no evidence of any purpose for asking the question. Nor is there any evidence of any advantage and benefit to the defendant in falsely answering the question, or evidence of the corollary that the Sheriff was put to any disadvantage or suffered the loss of any benefit.

The trial court instructed the jury that before a false statement as to nationality status would be an offense, the person inquiring must be engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration. [R. 28.] What was the matter, then, under consideration? The arrest of petitioner on suspicion of

bookmaking, and at most his identity. Identity of the person accused of suspicion of bookmaking is fully established by age, address, color of hair and eyes, complexion, physical characteristics and fingerprints. Identity is, and can be, established wholly apart from citizenship. Citizenship is truly a status as distinguished from identity. Nationality status was not relevant or material to either the arrest or identity anymore than his religious or political affiliations. **There was no testimony that Exhibit 5, which contained the citizenship question and answer, was used by the sheriff for any purpose whatsoever.** There was only testimony of use and purpose concerning Exhibit 4, and this arrest slip did not contain the citizenship question; and as to this exhibit the testimony was that it was used by the sheriff's office itself "for identification and the charge they are booked on." [R. 89.]

The sole evidence as to Exhibit 5 is that it was a form used by the sheriff. We have appended the entire testimony on the subject matter of the use and purpose of Exhibits 4 and 5, and the use, if any, made of the information contained in these exhibits, as our Appendix I. Also, there was no evidence concerning citizenship status being essential or material to the system of booking established by the sheriff's office.

The Court of Appeals resolves the existence of fraudulent purpose as being established by concealment of true nationality status from the sheriff's office on the mere

assumption that "it is fair to assume that appellant was concerned with future consequences. We think the disclosed record of three arrests and an imposing investigation of the Immigration Department on a deportation charge warrants this conclusion. We see no other motive for the false statement than that it was 'made with intent to deceive * * * as to a material matter.'" The three arrests referred to are:

One involved in the count under consideration—May 25, 1944 [R. 3] and two subsequent ones—November 1, 1945 [R. 11], and June 21, 1947, both of which counts were reversed. As to his arrest on November 1, 1945, this was on a charge of shooting dice; on this charge he was tried and acquitted. [R. 100, 113.] As to the arrest on June 21, 1947, he was not charged with an offense but was temporarily held as a material witness. [R. 158.] We fail to see how these two *subsequent* incidences would warrant a conclusion that in the instance of the earlier arrest in 1944 he made a statement as to citizenship with intent to deceive. As to the pending proceeding before the Immigration Department, the record discloses that the Naturalization and Immigration Service was, through either previous investigation and the petitioner's sworn testimony before them, as well as his registration as an alien, at all times fully aware of his non-citizenship status. [R. 149-157.]

We note that there is no evidence in the record of any exchange of information between the sheriff's office and

the Naturalization and Immigration Service. We also note that the charge was for suspicion of bookmaking and a misdemeanor and did not involve moral turpitude. Lacking this element there was no future consequence that he could suffer by reason of disclosure of his arrest, even if the sheriff had a system of advising the Naturalization and Immigration Service concerning the arrest and charge.

Good moral character not being involved in the charge upon which he was arrested, we can take judicial notice that under the Immigration and Naturalization laws, no consequences adverse could have resulted because of an arrest for suspicion of gambling. There was not the slightest advantage and benefit gained by appellant by not truthfully disclosing his alienage; neither was the sheriff put to any disadvantage or lose any benefit by reason of the answer given. The results, advantages and benefits in all aspects would have been precisely the same if he had truthfully disclosed his alienage. There was no deception.

The Court of Appeals held:

> "Where some right to inquire exists or the person inquiring has a good and sufficient reason for learning the citizenship of the person asked, it is sufficient,"

and that the inquiring officer was such a person. We submit that under the decided cases the test is not the narrow one of a person having "some right" or "a good and sufficient reason."

Many persons qualify to ask nationality status on a premise of a "right" or "good and sufficient" reason, who do not have a right or adequate reason pursuant to official authority and duty, be that public or private as in the case of an employer. Would such "right" or "good and sufficient reason" exist in the case of a survey agency like Gallup in gathering information for a client concerning the attitude of the voters on a specific public issue. For example, in connection with ascertaining the view of the voters in order to assure integrity and accuracy of the survey the first question asked might well be: "Are you a citizen of the U. S.?" Under the above holding of the Court of Appeals, a person in the Gallup survey example would be guilty of offense under the statute. The Court of Appeals wholly fails to define either "some right" or "a good and sufficient reason." In the absence of a definition or the setting up of a standard establishing what is meant by these words, one can only conclude that what constitutes an offense has been broadened far beyond the decided cases.

We have been unable to find any cases using the words "a good reason to inquire," or holding that the statute is violated if a false statement of nationality status is made to a person merely having "good reason to inquire." The *Achtner* case of course does use the language, "the representation * * * must still be made to a person having some right to inquire or adequate reason to ascertain * * * citizenship"; but it, also, sets up a standard that excludes as

offenses mere untruths as to citizenship by tying together the "right to inquire or adequate reason" with fraud.

We cannot escape the conclusion that the false statement must be made to a person so situated, either in a public or private capacity, that the asking of it was in furtherance to his official authority and duty; and that the false statement would or could result in defrauding such person or his principals.

We submit that the opinion in the instant case is in conflict with the previous opinion of the Court of Appeals in the *DePratu* case, and is in conflict with the decided cases of other circuits.

Respectfully submitted,

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Of Counsel.

APPENDIX I.

There was no evidence whatsoever of any comity arrangements between the Sheriff's office and any other police agency respecting the interchange of information or that the Sheriff's office furnished any information gathered from booking slips at the time of a person's arrest to any other police agency whatsoever, or furnished any information to any agency, police or otherwise.

The sole testimony concerning the count involved came from the witnesses Siu, Becker and Hopkins. [R. 80, 92, 121.]

The sole testimony of the arrest slip [Ex. 4] and of booking slip [Ex. 5] and the use made of the information contained was as follows:

The witness Siu testified on direct as follows:

> "Q. Mr. Siu, what we want here is: What is meant by 'booking'? A. 'Booking' is getting the information down on paper before we take them to the County Jail.
>
> Q. Then the prisoner is taken to the jail, is he? A. Yes.
>
> Q. And that information that you take down on paper, what happens to it? A. Well, that goes to the booking office, and that is copied on another piece of paper, I think it is triplicate.
>
> Q. Do you know the *purpose* of the Sheriff's office in taking that information. A. *For a matter of record identification.*
>
> Q. You have in your hand Exhibit 4, for identification, don't you? A. Yes." [R. 81, 82.]

This is the arrest slip [Ex. 4] made out by Siu, and contains nothing regarding citizenship.

"Q. Now, there is Exhibit 5 before you. Is that Exhibit 5 part of the booking procedure record? A. This was made out in the County Jail.

Q. Well, the question is, is it part of the booking record of Mr. Smiley on the occasion of that same arrest? A. Yes, it is." [R. 83.]

"Q. And is it a record that is required to be kept in connection with the booking of a prisoner under the circumstances that prevailed when Mr. Smiley was booked? A. Yes, it is kept by the County Jail booking office.

Q. Did Mr. Smiley give you the answers to any of the questions that appear on Exhibit 5, for identification? A. Well, the top part of this, where my signature is, is the same information that is on the arrest slip.

Q. As to the part below your signature, did you have anything to do with that? A. No, I didn't make that out." [R. 89.]

On cross-examination Siu testified:

"Q. Mr. Siu, directing your attention now to Exhibit 4 for identification, that is the slip that you had in your hand, was it not, and what you have been testifying from? A. Yes." [R. 85.]

"Q. Don't you, on occasions, frequently find a recalcitrant citizen who refuses to answer questions of police officers? A. Yes.

Q. And you still have to make a booking slip for identification purposes, don't you? A. Yes, sir.

Q. *And that is all this is, is simply to identify the individual whom you have under arrest?* A. *Yes.*

Q. *Now, there is no specific purpose beyond that for such booking slip?* A. *We make out a booking slip for identification and the charge that they are booked on."* [R. 89.]

Ralph W. Becker, a Deputy Sheriff, testified that he was in charge of keeping the records "of the identification of persons booked in the Los Angeles County Jail"; that Exhibit 5 "is a booking slip of the Los Angeles County Jail"; that it was an original record and kept by him in the ordinary and regular course of business of the Los Angeles County Sheriff's office. [R. 93.]

The witness Hopkins, a Deputy Sheriff, testified that he asked Mr. Smiley questions contained on the booking slip, Exhibit 5, at the time of his arrest, and that it contained the information received from the prisoner [R. 122]; that Exhibit 5 is a record kept by the Sheriff's office in the regular and ordinary course of its business; "and acted upon by it in whatever business it has concerning the prisoner"; that it was required at the time that he made it out, to be preserved and kept as a record [R. 133]; that it is the customary procedure; that "the Sheriff himself supervised the formulating of that form that we used there"; that he found the form in the office, and was told to use that form in booking persons, and that is what he did. [R. 133-135.]

The foregoing is all of the evidence on the subject of use and purpose of the booking slip. In fact, the foregoing is all of the evidence on the third count as to use unless the generalized testimony of the witness Hood would be considered pertinent.

We can see no relevancy at all to the testimony of Mr. Hood, which deals solely with the existing practice of

the Federal Bureau of Investigation. Mr. Hood didn't testify that any information was received at all by his Bureau from the Los Angeles County Sheriff's office, either from finger print cards, booking slips, or from any other source. His testimony was confined solely to the practices of his Bureau and not to any practices whatsoever of the Sheriff's office. Aside from the foregoing testimony of the Deputy Sheriffs, there was no evidence whatsoever of any practice and procedure by the Sheriff's office in the use of booking slips. *There was no testimony that Exhibit 5, which contained the citizenship, was used for any purpose whatsoever.* There was only testimony of use and purpose concerning Exhibit 4 and this arrest slip did not contain the citizenship question; and as to this exhibit the testimony was that it was used by the Sheriff's office itself "for identification and the charge they are booked on." [R. 89.]

The appellant was not a known criminal, nor did he have a criminal record. There was no evidence concerning citizenship status being essential or material to the system established by the Sheriff's office. Even as to the arrest slip [Ex. 4] the evidence only disclosed that it was used to identify the individual and the charge . Of course, identity was fully established by name, address, age, height, color of hair and eyes, complexion, physical characteristics and finger prints.

APPENDIX II.

(That portion of the opinion relating to count affirmed.)

Under Count Three of indictment No. 20,069 the misrepresentation was alleged to have been made to one J. E. Siu, a Deputy Sheriff of the County of Los Angeles.

* * * * * * * * *

As to Count Three contained in indictment No. 20,069 the evidence is substantially to the effect that appellant was arrested by a deputy sheriff at Los Angeles and booked during the process of which certain information was elicited from him. To one of the questions, "United States Citizen," appellant answered "Yes." This answer is conceded to be false. The problem thus posed is: Does this answer constitute a representation falsely and fraudulently made to a person having good reason to inquire into the nationality status of appellant? The allegations of the indictment and the provisions of sub. par. (18) of §746(a) require such a degree of proof to sustain the conviction.

The answer was made to a deputy sheriff acting in his official capacity. The information was sought from appellant under a system and custom in force in the sheriff's office of Los Angeles County which applied to all persons arrested and booked by the sheriff's office. This system was obviously installed under the belief that it would aid in the administration of justice and in obtaining a knowledge of the background of law violators. When the deputy sheriff asked the question he was no "prying busybody" but an official seriously performing a duty imposed upon him by the custom and practice of the sheriff's office. It was in furtherance of his official authority as a deputy sheriff and a duty imposed upon him by his superior.

Appellant argues that his citizenship status was immaterial to the gambling charges upon which he was being held as a material witness. Be that as it may, the questions asked, including citizenship status, were material in an overall system for the proper functioning of such an important office as that of sheriff of Los Angeles County and it seems that said office deems it necessary in the administration of their official duties to get the history of arrestees. It is common knowledge that peace officers find it important and helpful in the detection of crime to know as much as possible about known criminals and associates of known criminals and systems of registration are devised for that purpose. Arrestees giving false answers to questions asked undoubtedly do so with a fraudulent purpose of concealing from the peace officers as much as possible about themselves on the theory that the less known about them the greater chance they will have to escape detection in the event of future law violations. Appellant argues that regardless of how he had answered the question of citizenship he would have suffered the identical consequences of being charged with gambling violations and being held as a material witness and that, therefore, there was an absence of proof that the answers were "more than a mere untruth, but were given with intent to defraud." We do not agree. To say that appellant in answering was concerned only with the probable consequences of the particular detention is to take too narrow a view of the existing situation. It is fair to assume that appellant was concerned with future consequences. We think the disclosed record of three arrests and a pending investigation by the Immigration Department on a deportation charge warrants this conclusion. We see no other motive for the false state-

ment than that it was "made with intent to deceive * * * as to a material matter."

Appellant argues that an excuse for the giving of the false answer as to citizenship may be found in the constitutional right against self incrimination. The Constitution grants the privilege to refuse to answer on that ground but it affords no protection against the giving of a false answer.

Congress used broad language in making misrepresentations of citizenship an offense. Taken in a literal sense the language of the statute is sufficiently broad to make it a crime for anyone to knowingly and falsely represent himself to be a citizen of the United States without regard to whether or not the person to whom the false statement is made had good reason to inquire into the nationality status of the party. The courts have placed the latter interpretation on the language and we agree such an interpretation is reasonable but we are unwilling to further extend the language to the extent appellant has asked and say that misrepresentations of citizenship, to be a crime, must be made in answer to an inquiry from one having a legal right to ask in furtherance of official authority and authorized by a law which imposes a duty on a questioned individual to answer. Appellant, in making this argument, is of course referring to the instant case and concedes that answers to persons other than those in official authority can, under certain circumstances, be a violation of the statute. United States v. Achtner, 2 Cir., 1944, 144 F. 2d 49. The necessity of keeping a record as to the background of law violators, and the interchange of information among law enforcement agencies which aids in the surveillance of and makes easier the apprehension of

known criminals, places peace officers in the class of persons having "some right to inquire or adequate reason for ascertaining a defendant's citizenship." If we correctly understand appellant's argument, he insists that the case of United States v. DePratu, 9 Cir., 1948, 171 F. 2d 75, decided by this court, sets up the standard which must be met in order to sustain a conviction under the false representation of citizenship statute, in that this court found that the question of citizenship there was material to the transactions at hand and also that the law gave the authority and imposed the affirmative duty on the officers inquiring to ascertain the citizenship status of the defendant in that action. This court was dealing with the facts of that particular case which it found warranted the conviction. It did not say that less would not suffice. We hold that where some right to inquire exists or the person inquiring has a good and sufficient reason for learning the citizenship of the person asked, it is sufficient, and that the inquiring officer in this case was a person with a right to inquire and a sufficient reason for so doing.

* * * * * * * * *

Judgment of conviction on Count One, Indictment No. 20,069, and of the count contained in indictment No. 20,604, are reversed with directions to the trial court to enter an acquittal on said counts.

Judgment of conviction on Count Three of Indictment No 20,069 is affirmed.

(Endorsed:) Opinion. Filed Apr. 13, 1950. Paul P. O'Brien, Clerk.

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